United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUSA PARROT MINING AND SMELTING COMPANY (a Corporation),
Plaintiff in Error,

v.

THOMAS MONAHAN,
Defendant in Error.

No. 1521.

Brief of Plaintiff in Error

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BUTTE MINER COMPANY, PRINTERS, BUTTE, MONT.

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BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff below, defendant in error here (hereinafter called, and referred to as, the plaintiff), recovered judgment, on the verdict of the jury, against the defendant below, plaintiff in error here (hereinafter called, and referred to as, the defendant), for the sum of four thousand and five hundred dollars ($4,500), for damages alleged to have been suffered by plaintiff by reason of injuries occasioned as alleged by the negligence of the defendant.

It is alleged in the complaint that the plaintiff was, on the 12th day of July, 1904, an employee of the defendant

at the Butte Reduction Works, in Silver Bow County, Montana; that the defendant, negligently, willfully, and intentionally, permitted the roof of its ore house to be dangerous, in that it carelessly and wantonly permitted and allowed a certain copper wire, insufficiently, carelessly and negligently insulated, and charged with twenty-five hundred (2,500) volts of electricity, to hang and remain at a distance of only about four (4) feet above the roof where plaintiff was at work; that the defendant had known for a long time prior thereto that the said wire was insufficiently insulated, and negligently and carelessly insulated, and that it hung at said distance of four feet only above said roof, and was dangerous to the life of any person coming in contact therewith; that the insulation of said wire was weather-proof only, and not designed to protect human beings coming in contact therewith; and that the defendant, for a long time prior to the 12th of July, 1904, knew that at the point where plaintiff touched said wire the same had no sufficient insulation.

Plaintiff further alleges that on said date plaintiff was sent upon the said roof of said ore house by defendant's command, and, "being ignorant of the danger of touching the said wire, inadvertently, with his left hand, and while engaged in the business of his master, took hold of said wire, so insufficiently and negligently insulated by the defendant as aforesaid, and charged by the defendant with electricity as aforesaid," whereby he was injured.

The answer of the defendant to the complaint takes issue upon the allegation of negligence set forth in the complaint, and specifically sets forth, as an affirmative

defense, the contributory negligence of the plaintiff, in that, while upon the roof of said ore house while the same was in a wet and slippery condition and difficult to stand upon, he failed to exercise due and proper precautions to avoid slipping, slipped upon said roof, and, to save himself from falling, took hold of the wire in question, and thereby received the shock of electricity through which he claims to have been injured. It is further affirmatively set forth that the plaintiff was guilty of contributory negligence, in that he wore upon his hands gloves containing metal fastenings, contrary to the requirements of the defendant, and against its instructions and advice. A further affirmative defense is set forth, wherein it is alleged that the plaintiff assumed the risk incident to his employment, and that among other risks and hazards was the presence of the electric wires upon the roof of the building, of which he complains. It is further affirmatively set forth that on the 26th of November, 1904, the said plaintiff had brought a suit in the United States Circuit Court for the Ninth Circuit, District of Montana, against this defendant, together with others; that the cause of action set forth in the complaint filed in said cause was identical with the cause of action set forth in this case, and the statement of facts as alleged in said complaint substantially conformed to the statement of facts set forth in the complaint herein; that thereafter, on the 12th of December, 1904, the demurrer of this defendant to said complaint was filed; that thereafter, on the 5th day of January, 1905, an amended complaint was filed in said cause; that on the 23rd day of January, 1905, this defendant filed its motion to strike said amended complaint from the files; that on

the 14th day of February, 1905, the said cause coming on regularly for hearing upon said motion to strike, the plaintiff appeared by his counsel, and this defendant appeared by its counsel, and thereupon, by consent of the respective parties, the said cause was dismissed as to this defendant, and it was expressly then and there stipulated and agreed that each of said parties—plaintiff and this said defendant—should pay its own costs, and that said cause was, by agreement of the parties aforesaid, dismissed, which said agreement was an oral agreement in open court; and that said dismissal operated as a *retraxit*, and was a voluntary recognition on the part of the plaintiff of his right to no further prosecute said cause of action, or any cause of action founded upon the same state of facts, as against this defendant.

To this answer the plaintiff replied, wherein it was admitted that the roof of said ore house at times became wet from rain and natural causes, and that the plaintiff was upon said roof when the same was in a moist, wet, and slippery condition, and that said plaintiff was standing erect thereon; that as to whether or not the plaintiff attempted to and did voluntarily grasp the said wires for the purpose of steadying himself while standing upon the said roof, plaintiff had no memory or recollection, nor information sufficient to form a belief. It was further admitted that the roof of said building became, and was at the time the plaintiff went thereon at the time of the accident, wet and slippery by reason of a rainfall and natural causes, and that in said condition said roof was slippery and difficult to stand upon; that as to the allega-

tions set forth in said answer relative to the plea of a *retraxit*, being the fifth defense in said answer, plaintiff admitted the pendency of the prior suit, and the pleadings and proceedings therein, and that the cause was dismissed, and that it was agreed that each party should pay his own costs, and that such an agreement was an oral agreement in open court; and affirmatively denied that the attorney for the plaintiff, as an attorney at law, had any authority whatever to enter a *retraxit* as set forth in defendant's answer.

Under the allegations of the complaint, two specific grounds of negligence are specified against the defendant. One is that said defendant permitted the alleged dangerous wire to hang only four feet above the roof of the ore house. The other is that the wire so suspended was, at the point where plaintiff touched it, insufficiently insulated to protect the plaintiff from injury.

The plaintiff alleges that he was injured because, being ignorant of the danger of taking hold of the wire in question, he inadvertently took hold of the same, and thereby received the injuries of which he complains. It is manifest from this statement that it was his own voluntary act—the taking hold of the wire in question. No necessity therefor is shown or alleged. The alleged negligence of the defendant in no way contributed to the situation, but the plaintiff himself, without any reason being assigned therefor, voluntarily placed himself in such a position that through his own act he was injured. The word "inadvertently" carries the idea that he was not paying due and proper attention to the circumstances and conditions sur-

rounding him at the time; and the proximate cause of his injury, according to the allegations of the complaint, is his own lack of attention, or, as he describes it, his inadvertence. In his reply, the plaintiff admits the slippery and dangerous condition of the roof, and recognizes the necessity for the care and caution which a reasonable man should exercise in the discharge of dangerous or hazardous employments.

At the commencement of the trial and before the introduction of any evidence in the case, the defendant objected to the introduction of any testimony in the case upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This objection was by the Court overruled, to which an exception was duly taken. Thereupon, subject to this objection, the trial of the case proceeded, and it was developed by the testimony that the plaintiff, on the 12th day of July, 1904, was in the employ of the defendant at its reduction works, as a member of the rope gang; that in the performance of his duties he was sent upon the roof of the ore house; that extending across the roof of the ore house were three wire cables carrying electricity for distribution in the works of the defendant; that at the point where the plaintiff took hold of the wire in question a connecting wire had been attached; that this connecting wire, when the connection was made, had been soldered to the main cable; that then it was wrapped around with rubber tape to the depth of several layers, and over this was wrapped a variety of tape called stick tape to hold the rubber tape in its place; that the joint was entirely covered with several thicknesses of

rubber tape, and over this there was an additional covering of stick tape to hold it in place.

It was further testified by all of the electricians who were introduced as expert witnesses in the case that this form of insulation was the best practical form of insulation in commercial use. The point where the witness took hold of the wire in question was identified as the joint testified to by the witness Elliott, and that at the point where he took hold of the wire the insulation was of the character and quality named, and that this insulation was the best and most perfect that was possible to be made.

There was some testimony to the effect that the main cable at points in the vicinity of this connection had only weather-proof insulation, but the point at which Monahan took hold of the wire was specifically identified, and the insulation at that point was, according to the testimony of all of the witnesses, the most perfect that could be made; and there was nothing further that could have been done by the defendant to have more perfectly insulated the wire.

It further developed by the testimony that the plaintiff, after he had performed the work for which he had been sent upon the roof, rose, stood upon the roof, and prepared to descend in response to the command of his boss; that as he started upon his return, his foot slipped; to save himself from falling he threw out his arm, caught hold of the wire at the point named with his left hand, and was injured by the electric shock. It also developed that plaintiff had upon his hands gloves which had metal fastenings; that his boss had warned the men under his command to be careful; that he knew that the wires were close to the

roof, so that he was compelled to stoop under them in order to reach the edge of the roof, where he was to perform his duty; that he knew that electric wires were dangerous, and that these wires carried electricity.

It is further in evidence in the case that plaintiff was not injured as seriously as he pretended; and an examination by a physician of eminence and skill, appointed by the Court, namely, Dr. O. Y. Warren, resulted in the statement by that physician that in his judgment the plaintiff received no such injuries in their consequences as complained of by him.

In the course of the trial of the case, certain witnesses for the plaintiff were permitted to testify, over the objection of the defendant, as to the condition of the premises nearly two years after the accident; and it developed further in the testimony of the case that a fire had taken place at the Butte Reduction Works; that the building upon which the plaintiff was at the time he was injured had been partially destroyed, and that the particular wire which he had taken hold of had been burned, and the insulation thereof practically burned off, so that the condition of the wire at the time when the examination was made by the witnesses was entirely different from that that prevailed at the time of the accident. This testimony as to the condition of the premises two years, or thereabouts, after the accident, was objected to by the defendant, and the objection overruled; and the admission of this evidence is assigned as error prejudicial to the defendant in the case.

Certain of the expert witnesses on the part of the plain-

tiff were permitted to testify, over the objection of the defendant, as to the best known method of insulation of electric wires. The test, as contended for by the defendant, was not that the employer was bound to use the best or safest method, but only was called upon to exercise reasonable care in this regard. The admission of this testimony is assigned as prejudicial error in this case.

It further developed that in the course of the trial witnesses on the part of the plaintiff were permitted to testify, over the objection of the defendant, as to the dangerous character of the premises, and the use of electric wires as detailed by the witnesses and shown on the model before the jury, and were permitted to testify further, over the objection of the defendant, as to whether or not, in the opinion of said witnesses, the use of wires of the character indicated would be dangerous to human life. The admission of this evidence is assigned as prejudicial error by the defendant.

There was also introduced in evidence, over the objection of the defendant, the testimony of an insurance agent, who gave testimony as to the expectancy of life of a man of the age of the plaintiff and the cost of an annuity of one hundred dollars ($100) per annum, and more. The admission of this evidence is assigned as prejudicial error by the defendant.

In the progress of the trial, a witness was asked if he had not testified at a former hearing that weather-proof insulation was unsafe. This was after the place where the plaintiff had taken hold of the wire had been specifically identified by him, and all of the evidence in the case on

the part of both plaintiff and defendant had established the fact that the insulation at that point was not weather-proof insulation only, but was rubber covered with stick tape, and was of the most approved and perfect character known to electricians. The introduction of this evidence was objected to upon the ground that it did not correspond with the facts, was irrelevant, immaterial, and incompetent, and tended to prejudice the rights of the defendant in the case. The objection was overruled, and the admission of this evidence is assigned as prejudicial error in this case.

When it came to the question of *retraxit*, the defendant offered in evidence the pleadings and proceedings in the former case in order to sustain on its part the issues raised by the allegations of the fifth affirmative defense of the answer and the reply thereto. This was objected to by counsel for the plaintiff, and the objection thereto sustained. The only objection presented in the reply to the plea of *retraxit* set forth in the answer is that the counsel for the plaintiff had no authority to enter a *retraxit*, and that if a *retraxit* had been entered it was without authority on the part of the Court to so enter the same, the sole objection thereto being that the plaintiff's counsel had acted without authority; and this objection is the only objection presented to the offer of proof. An examination of the testimony offered reveals the fact that the case was dismissed as to the defendant by agreement of counsel, and that each party was to pay his own costs. The ruling of the Court in sustaining this objection is assigned as error prejudicial to the defendant.

The case was submitted to the jury under instructions of the Court, a verdict in favor of the plaintiff for $4,500 returned; judgment was entered thereon; a bill of exceptions was duly prepared, signed, settled, and allowed by the Court, and duly filed; and a writ of error sued out to this Court.

ASSIGNMENT OF ERRORS.

1. The Court erred in overruling the objection of defendant—which was made before the introduction of any testimony in the case—to the introduction of any evidence upon the ground that the complaint did not state any cause of action against the defendant sufficient to warrant a recovery on the part of the plaintiff against the defendant, Colusa Parrot Mining and Smelting Company.

2. The Court erred in overruling the objection of defendant's counsel to the statement made by witness A. B. Elliott, on his redirect examination, which objection and proceedings were as follows, to-wit:

"Q. In what relative condition was it then, compared to the condition it was in when you put it on?

Mr. SHELTON.—Now, just a minute. This was subsequent to the date of the accident, as I understand it.

Mr. MAURY.—That is conceded.

Mr. SHELTON.—The period asked about, as I understand it, was in November. What period did he say, October or November?

Mr. MAURY.—Well, some time last winter, the winter of last year; it is conceded that that was subsequent to the date of the injury.

Mr. SHELTON.—Yes; and this accident took place on the 12th of July, 1904.

Mr. MAURY.—Yes.

Mr. SHELTON.—And may I be permitted to ask the witness if he made this examination?

The COURT.—Yes.

By Mr. SHELTON.—When was it you made this examination?

A. Why, it was a short time before this case was argued here in court this last time; I don't remember just when it was.

Q. Well, it was last winter, was it?

A. I think it was last winter.

Q. 1905, I don't remember the date?

A. I don't remember the date; I know it was about a week before this case was argued here in court.

Mr. MAURY.—Q. That was the Missouri River Power Company?

Q. Yes, sir; that was the Missouri River Power Company.

Q. If the trial was on the 18th day of April of last year, the day of the San Francisco disaster—

A. (Interrupting.) If it was on the 18th of April, then I would say that I made an examination of those wires between the 10th and the 18th.

Mr. SHELTON.—Then we object to this statement as being too remote and an examination of this wire a year—nearly two years—a year and nine months, after the accident, would not, as we apprehend, give any criterion to determine what was the condition of the wire prior to that time, as I understand the presumption that a matter continues in a condition once shown to exist, is not either retrospective nor can it be presumed.

Mr. MAURY.—I think you misunderstood the question. I asked the relative condition last year compared to the condition when he left several years ago.

Mr. SHELTON.—The condition last year would not be material, or a comparison between the condition last year and the condition when he left it seven years before.

The COURT.—I think it is competent.

Mr. SHELTON.—It is too remote.

The COURT.—I find it is difficult to pass upon it unless one knows something about it.

Mr. MAURY.—Sir?

The COURT.—I say it is difficult to say from a scientific standpoint what the condition of the electric wire would be. I think it is competent for this witness to answer.

The WITNESS.—Well, taking the wire that was there, it is known as triple-plate weather-proof wire, and it is not considered safe, no, sir.

Mr. SHELTON.—Now, just wait a minute. That is not an answer to the question.

Mr. MAURY.—I think the witness misunderstood, as

Mr. Shelton did. The relative condition; how did the condition correspond or not correspond last year with the condition as you left it seven years ago?

A. Well, that I could not answer intelligently. All I know is that I helped to run three wires across there, and I helped to connect these wires on at that point or near that point. Those wires might have been changed a little, in the meantime.

Q. What kind of insulation did you leave on the wire at the white rag?

A. We used some tape.

The WITNESS.—That insulation at that point was nothing more than taping, or insulating the joint. That would be what we would call it—insulating. Beyond, on each side of the tape, there was triple-plate, weather-proof wire."

3. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness A. B. Elliott, on his redirect examination, which objection and proceedings were as follows:

"Q. What was the best insulation known to protect human beings from a current in July, 1904, and in the vicinity of Butte, Montana?

Mr. SHELTON.—Just a minute. We object to this as incompetent and immaterial, as the question of what is the best insulation known at a given time, being a period remote from this particular period, is not the test by which

the negligence or non-negligence of an employer is to be determined.

Mr. SMITH.—We fix the time in the question—July, 1904, at the time of the accident.

Mr. SHELTON.—At the time of the accident, but I say the test is not the best proof. It is only such a reasonable precaution as men, ordinarily, in the exercise of their ordinary business, would be called upon to provide, considering all the circumstances surrounding the accident.

The COURT.—Considering, always, of course, the danger of the affairs.

(Exception.)

(Question repeated.)

Mr. SHELTON.—There is another objection which I desire to present, and that is that the portion of the question, 'what was the best insulation on the day of the accident known,' is immaterial, for the reason that if, at the time this wire was put up, the insulation was the best then known, there is no obligation on an employer to renew and change the insulation or the protection with each changing variety or discovery in electrical science, unless there is brought directly to the knowledge of the employer the very dangerous character of the appliance employed, and the necessity of adopting other varieties of appliances.

The COURT.—I think it is competent. It is not to be supposed that you are operating trolley cars through a city using wires that may have been made thirty years ago, where it might be assumed life was constantly imperiled by reason of imperfect holders, or from other causes, and

that within the past five years the safety to life was very greatly enhanced by a commonly used different appliance; I think it would be a circumstance—the ordinary daily pursuit of life. It would be a horrible thought, that no company kept apace with the change in the methods of preserving life.

The COURT.—What might have been reasonably safe with a dangerous force like electricity twenty-five years ago, and what might have exonerated an employer, because he used due care in getting reasonable appliances, might not exonerate him because he had used due care and obtained reasonably safe appliances today, assuming that inventions have changed so that the appliances are safer today than they were twenty-five years ago. That is the way it appeals to me, so I say the witness can answer.

(Exception.)

A. The best insulated wire that was known at that time, and in fact at the present time, is rubber-covered wire.

The WITNESS.—I could not answer just how long rubber-covered insulation had been in use in Butte prior to July, 1904. I should judge in the neighborhood of, oh, fully fifteen years. I had used it ever since I came to the town, that is about ten or eleven years ago. I would say that it was used in Butte at the time those wires at the white rag string on the model were put up. It had been used in Butte a great length of time before that. I don't remember just exactly the kind of wires we put up to run to the blacksmith shop. I know the kind of wires we tapped on it. There was no other kind than this that we put up there furnished us to put up there."

4. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness A. B. Elliott on his redirect examination, which objection and proceedings were as follows, to-wit:

"Q. Mr. Elliott, what have you to say, and I will repeat the question that was asked this morning, when the cross-examination commenced, if I can. What have you to say as to the safety or danger to a man standing on a corrugated roof under the white rag and touching the wire at the white rag, if the dynamos or motors connected with that wire were in operation?

Mr. SHELTON.—Just a moment. To that I object on the ground that it is immaterial and irrelevant and incompetent. That, in the first place, it calls for an opinion of the witness upon a matter that should be left to the jury, that it is a matter for them to determine, whether there was an unsafe condition there at that time, and to determine whether that unsafe condition was the result of the condition of the wires.

We object upon the further ground that the witness has not qualified himself to testify as to this particular variety of testimony as an expert, if it is expert testimony.

The COURT.—I think it is competent. You see, he states in his question, 'assuming that the dynamos' did this or that. It is hypothetical as it is framed. So far as the question of safety is concerned, in this case the ultimate conclusion as to whether it was safe or not will have to be determined by the jury. In an insanity case the jury have to pass ultimately upon the question of the insanity

of the person being tried, but it is perfectly proper for a doctor to be asked whether or not he considers the person insane. I think this is competent on that hypothesis.

(Question repeated.)

A. I would think that he was taking great chances of being killed."

5. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness A. B. Elliott (recalled for further redirect examination), which objection and proceedings were as follows, to-wit:

"Q. You noticed an exposed place at the joint when you visited the house last winter, the winter a year ago?

A. Yes, sir; I noticed a point near that point.

Q. Where the wire was exposed?

A. Yes, sir.

Mr. SHELTON.—Just a minute. What time was that?

Mr. MAURY.—When he visited it last winter.

Mr. SHELTON.—We object to that, then, if the Court please; it is too remote.

The COURT.—Are you going to show that it was in the same condition about the time of the accident that it was when he visited it?

Mr. MAURY.—Approximately the same condition.

The COURT.—You may answer.

(Defendant excepts.)

A. Yes,"

6. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness A. B. Elliott (recalled for further redirect examination), which objection and proceedings were as follows, to-wit:

"Mr. MAURY.—Q. Did you notice any other breaks in the insulation except right at the joint of any of the electric wire there?

Mr. BICKFORD.—We object to that as irrelevant, immaterial and incompetent.

Mr. MAURY.—That is possibly anticipating one of the defenses which they are seeking to make.

The COURT.—Let him answer.

(Defendant excepts.)

A. I noticed quite a few places along the line where wires had been tapped in. I didn't particularly notice any break right near in that immediate vicinity where that connection was made."

7. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness W. D. Fenner, on his direct examination, which objection and proceedings were as follows, to-wit:

"Q. Just tell the Court and jury, Mr. Fenner, how much it would cost to buy a man twenty-six years old an annuity of one hundred dollars per year for the remainder of his natural life, and so that there would be nothing left over for his estate after his death?

A. What age?

Q. Twenty-six?

Mr. SHELTON.—Just a minute. Is that all of the question?

Mr. MAURY.—That is all the question.

Mr. SHELTON.—To that we object, if the Court please, upon the ground—and, of course, we assume that the facts as assumed and as involved in the question will be supplied.

Mr. MAURY.—Yes, sir.

Mr. SHELTON.—To that we object upon the ground that it is incompetent and immaterial in this case under the pleadings, and under the issues in the case, and that there is no testimony proper or admissible to show the cost of an annuity of one hundred dollars per year, or of any other sum, which would be charged to a man who sought one of the age of this defendant or of any other age.

The COURT.—I believe this is proper, assuming that you will prove the averments of your complaint, and you state you will.

Mr. MAURY.—Yes, sir.

Mr. SHELTON.—I want to call your Honor's attention to the fact that in the complaint which they have filed here, the complainant himself has alleged that his life will be shortened by reason of the accident, and so if this is true, and shown to be true by the complainant, the ordinary tables would hardly be reliable.

Mr. MAURY.—That is a question for cross-examination,

as to whether this man's condition makes any difference as to the cost of an annuity.

The COURT.—I think the question is proper. You can answer.

A. At the age of twenty-six years, an annuity of one hundred dollars a year for the portion of the life remaining would be $2,154.20.

The WITNESS.—An annuity for two hundred dollars is ascertained simply by multiplying the cost of an annuity for one hundred dollars by two. The rate does not vary with the man—not at all."

8. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness W. D. Fenner, on his redirect examination, which objection and proceedings were as follows, to-wit:

"Q. What is the expectancy of life, Mr. Fenner, for a man twenty-six years old in the northern states of America?

A. Thirty-eight and one-tenth years.

Mr. SHELTON.—Wait a minute. We object to that as incompetent, irrelevant and immaterial.

The COURT.—Let him answer.

A. Thirty-eight and one-tenth years."

9. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness A. D. Aiken, on his direct examination, which objection and proceedings were as follows, to-wit:

"Q. What have you to say as to the safety of a human being coming in contact with this wire, even if the insulation was in perfect condition, with the current which that wire was carrying, and standing on that corrugated roof?

Mr. SHELTON.—This is objected to as incompetent, irrelevant, and immaterial.

The COURT.—I think it is competent, his opinion.

A. Well, I would not like to take chances myself, even if it was rubber-covered."

10. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness A. D. Aiken, on his direct examination, which objection and proceedings were as follows, to-wit:

"Q. And supposing it was not rubber-covered, but covered with the insulation which it had on it, and suppose that insulation were new and in good condition?

Mr. SHELTON.—That is objected to as incompetent, irrelevant, and immaterial.

(Objection overruled.)

(Defendant excepts.)

A. Well, I would not consider that safe either.

The WITNESS.—I was at this point (indicating) some time just before the trial of this case last April, or the last trial; I believe I was. I think it was practically in the same condition then, compared to its condition on the day that Monahan was hurt; I think it was practically the same, as near as I can remember."

11. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness Michael Sullivan, on his direct examination, which objection and proceedings were as follows, to-wit:

"Q. What have you to say, Mr. Sullivan, as to the safety or danger of a man coming in contact with that insulation, if the wire was carrying a current of twenty-five hundred volts of electricity?

A. I would not—

Mr. SHELTON (interrupting).—We object to that as being incompetent, irrelevant, and immaterial.

The COURT.—Let him answer.

A. I would not consider it safe."

12. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness Michael Sullivan, on cross-examination, which objection and proceedings were as follows, to-wit:

"Q. What unusual matters or things did you see nailed to the roof along there from 'M' to 'N'?

Mr. SHELTON.—Now, we object to that as incompetent, irrelevant and immaterial.

The COURT.—I think it is a circumstance to get at the physical condition there.

Mr. BICKFORD.—It is not shown, if your Honor please, that these physical conditions, with which the witness is concerned, existed at the time of the accident.

Mr. MAURY.—It will be shown.

The COURT.—He may answer.

A. Why, there is a couple of cleats there right along the top of the roof."

13. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness James Keefe, on his direct examination, which objection and proceedings were as follows, to-wit:

"Q. What voltage in electricity will produce the death of a person coming in contact?

A. That is a pretty hard question for me to answer.

Mr. SHELTON.—I think it is incompetent, irrelevant, and immaterial.

The COURT.—He is trying to answer it very intelligently. He says it is very hard for him to answer.

The WITNESS.—That is a very hard question for me to answer.

The COURT.—Do you insist upon your objection?

Mr. SHELTON.—Only for the purpose of preserving it in the record. This is an objection that I have been trying to carry through, as to the opinion of the witnesses upon these points.

The COURT.—I think he can answer it. I am not altogether satisfied as to the form of the question propounded by Governor Smith. This is the question as to whether or not a witness considers a thing safe. Some Courts are very strict about that. It is like asking a witness whether he considers that if a man had gone over a railroad track,

under such and such conditions, he would have considered it safe.

Mr. SMITH.—The word 'consider' was not used in any of my questions. I simply asked him about this insulation, and whether such insulation was safe or not, and now I am asking him about the voltage.

Mr. SHELTON.—Now, upon that question, we will present to the Court the objection which I am endeavoring to preserve throughout the trial, that it is incompetent, irrelevant, and immaterial. I recognize the fact that there are authorities both ways on that point, and it is a proposition I want to preserve throughout the record, and I wish to renew my objection every time the question is asked.

The COURT.—Of course, when you ask an electrician whether or not he considers it safe to stand on a corrugated roof and take hold of a live wire having a potential force of twenty-five hundred volts, you are, in effect, asking him what, in his experience, would happen to a man that touched that wire, because if he says a man would fall down, in the light of common sense he would deem it unsafe to touch it. And some courts are very strict about these conclusions. I observed in the Circuit Court of Appeals in the Sixth Circuit, reference to a case a month ago, where a question was propounded to a man as to whether or not, under such and such conditions, a person would have gotten across the railroad track.

The COURT (continuing).—Well, Mr. Shelton has got his point preserved. I think myself it is competent. After all, the jurymen need never accept the opinion of any witness whatsoever. You cannot abrogate the right of the

jury to disregard an opinion, whether it be expert or lay.

Mr. SMITH.—That is true in all cases; at the same time, the opinion of the jury is made up of what they hear and see at the trial.

The COURT.—I think he can answer the question. The question really is, What voltage would kill a man?

Mr. SMITH.—Yes, what voltage is necessary to kill a human being coming in contact with it?

A. Well, as I said before, that is a very hard question to answer. Now possibly I would get a thousand volts and I would get out all right, and possibly you would get five hundred volts and it would kill you. It depends upon the circumstances of your system altogether, I think.

The WITNESS.—Less than five hundred volts will sometimes kill. I have known sixty to kill a man. I would consider twenty-five hundred, or in that neighborhood, very dangerous."

14. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness Dr. O. Y. Warren, which objection and proceedings were as follows; to-wit:

"Q. Doctor, if a man was continuously doing days' labor before the 12th of July, 1904, worked twenty-eight or thirty days a month at hard labor all day long, and had done that for years and years, and was of a cheerful, happy disposition, never sick, nor complained, and after the shock on the 12th day of July, 1904, he was found to be in a condition which you now find him, being neurasthenic,

what would you say as to the immediate superinducing cause?

Mr. BICKFORD.—We object to that, because the hypothetical question is based upon a state of facts which is not before the court or jury.

Mr. MAURY.—It will be before the Court, your Honor.

The COURT.—Let him answer.

A. I can only answer that as before: That the injury may be a contributing cause; that the true cause of neurasthenic conditions are found to be hereditary, and it would simply—the contributing cause would simply be—is simply the existing cause, the contributing cause, contributing to a clinical condition, the cause of which existed prior to receiving the injury."

15. The Court erred in overruling the objection of defendant's counsel to the following question asked of the witness George K. Aiken, which objection and proceedings were as follows, to-wit:

"Q. Do you remember testifying on that occasion in the presence of Judge Smith and of Ike Hamburger, his stenographer, and the jury, and the clerk of the court, that weather-proof insulation was never designed to protect human beings from the high tension current of electricity?

A. I did, sir.

Mr. SHELTON.—That we object to as entirely incompetent and not in any way a cross-examination.

The COURT.—I think it is proper.

Mr. SHELTON.—The witness has been interrogated here in regard to the variety of insulation at the point where this connection was made. Weather-proof insulation has not been gone into at all, because there is nothing in this case in any way tending to show that the man injured came in contact with the wire at a point where there was only weather-proof insulation. Monahan himself has identified specifically, and his witnesses have identified specifically, the point where he took hold of this wire, and it is identified as the place where Mr. Elliott testifies that he made the insulation mentioned.

Mr. SMITH.—It is not, may it please the Court, so definite but what his hand may have been at the joint where the two came together, so far as that is concerned. Monahan says within three or four inches he could tell.

The COURT.—It is perfectly proper to ask an expert as to his former statement regarding the subject immediately under investigation, and the insulation of wires in exposed places is the subject he is testifying to generally, as well as concretely. Answer.

A. Yes, sir; I answered that."

16. The Court erred in sustaining the objection of counsel for plaintiff to the introduction in evidence of the records in the case of Thomas Monahan, plaintiff, v. Colusa Parrot Mining and Smelting Company, a corporation, Missouri River Power Company, a corporation, Butte Electric and Power Company, a corporation, and Montana Power Transmission Company, a corporation, defendants, (being cause No. 261), in the Circuit Court of the United States,

Ninth Circuit, District of Montana,—and which offer and proceedings are as follows, to-wit:

"Mr. SHELTON.—I offer the amended complaint in cause No. 261, in the Circuit Court of the United States. Ninth Circuit, District of Montana, Thomas Monahan, plaintiff, against Colusa Parrot Mining and Smelting Company, a corporation, Missouri River Power Company, a corporation, Butte Electric and Power Company, a corporation, Montana Power Transmission Company, a corporation, defendants, filed and entered January 5th, 1905; the motion to strike the amended complaint, from the files, of the Colusa Parrot Mining and Smelting Company, in the same case, filed January 23d, 1905; the order of Court, made in open court February 14th, 1905, dismissing the case as to the defendant, Colusa Parrot Mining and Smelting Company, which order reads as follows:

'*Circuit Court of the United States, District of Montana.*

No. 261.

THOMAS MONAHAN

vs.

BUTTE ELEC. & POWER CO. et al.

This cause came on regularly for hearing at this time upon motion of defendant Colusa Parrot Mining and Smelting Company to strike from the files the amended complaint; W. M. Bickford and Geo. F. Shelton, Esq., appearing as counsel for said defendant, and H. L. Maury, Esq., as counsel for plaintiff, and thereupon, upon motion of counsel for plaintiff, it is

Ordered that this action be dismissed without prejudice as to said defendant Colusa Parrot Mining and Smelting Company, and without costs to either party.

In open court Feb. 14th, 1905.'

Also, the defendant offers to prove that this action now pending is based upon the same cause of action as that upon which the proceedings were had in cause No. 261, above referred to.

Mr. MAURY.—To which the plaintiff objects, for the reason and on the grounds that it nowhere appears from the papers and documents offered, nor from the proof which is offered, that it is expressly declared or appears by the judgment-roll that the judgment was entered or rendered upon its merit.

Second: That it does not appear that Monahan, the complainant in each suit, in any manner acted personally in the matter of the dismissal. That an attorney at law has no authority to finally dispose of his client's case without consideration, or to enter into a retraxit:

Third: That the law as to retraxit and the proceedings as to retraxit, as it was known at common law several centuries ago, is not known to the modern practice, and that the evidence is immaterial, irrelevant, and incompetent.

The COURT.—That covers it. The Court rejects the offer of proof, for the reason that it does not tend to prove that the plaintiff may not pursue the action now on trial.

That saves the whole record.

Mr. SHELTON.—Yes, sir.

The COURT.—And the exception of the defendant may be noted.

The said amended complaint is in words and figures as follows, to-wit:

(Title of Court and Cause.)

AT LAW.

AMENDED COMPLAINT.

And now comes the plaintiff, and before the submission of the issue of law, heretofore tendered by the several defendants, by their several demurrers, filed herein, files this his amended complaint, and complains and alleges:

I.

That at all of the times hereinafter mentioned the plaintiff was and now is a citizen of the State of Montana.

II.

That at all times hereinafter set out the defendant Colusa Parrot Mining and Smelting Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and a citizen of the said State of Washington.

III.

That at all of the times hereinafter set out the defendant Butte Electric and Power Company was and now is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said State of New Jersey.

IV.

That at all of the times hereinafter set out the defendant Montana Power Transmission Company was and now is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of the said State of New Jersey.

V.

That at all of the times hereinafter set out the defendant Missouri River Power Company was and now is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said State of New Jersey.

VI

That the amount involved in this action, exclusive of interest and costs, is more than the sum of two thousand dollars, and is the sum of fifty thousand dollars.

VII.

That on or about the 12th day of July, A. D. 1904, and for a long time prior thereto, this plaintiff was the servant of the defendant Colusa Parrot Mining and Smelting Company, and was such at the special instance, and request and consent, of the said last-named defendant, and of this plaintiff.

VIII.

That it was the duty of the said defendant Colusa Parrot Mining and Smelting Company, the master of this plaintiff, to provide and furnish the plaintiff, its servant, a reason-

ably safe place to work, wherever the said last-named defendant should send this plaintiff to do its work.

IX.

That on or about the 12th day of July, A. D. 1904, the said defendant Colusa Parrot Mining and Smelting Company commanded this plaintiff to go and work upon, and thereupon this plaintiff went, and worked upon the roof of the ore house, of said last-named defendant, the said ore house being then at, near and in the reduction and smelting plant of the said last-named defendant, the said plant being usually known as and called the Butte Reduction Works, and the same being then and there, and the said ore house being then and there, in Silver Bow County, Montana, in which county all of the acts herein set out took place and happened.

X.

That on the said day, and for long prior thereto, with full knowledge in them, all of the said defendants had negligently, willfully, and intentionally, and maliciously permitted the said roof to be unsafe and dangerous to all persons going over the same, and on the said day the said defendants did negligently, willfully, and maliciously, and intentionally, permit and make the said roof dangerous to all persons thereon, and did then and there negligently and carelessly and wantonly use a certain copper wire, insufficiently, carelessly, and negligently insulated, carrying and charged by the defendant with a large and dangerous current of electricity, to-wit, about 2,500 volts, hanging at a distance of about four feet above the said roof where plain-

tiff was sent and was on the said day; that the said defendants at the time it used the said wire at the said place (all which time is to plaintiff unknown, but plaintiff alleges that the said wire was used by defendant more than two months prior to the said day) well knew that plaintiff and many other servants of defendant Colusa Parrot Mining and Smelting Company would in the course of their employment go upon the said roof and come in contact with the said wire; and that all of the said defendants well knew for a long time prior to the said day that the said wire was hanging at a distance of about four feet above the said roof and that it was insufficiently insulated and negligently insulated, and that the same was charged with electricity as aforesaid, or the said defendants could by the exercise of ordinary diligence have known that the same was so charged, and negligently and insufficiently insulated and so hanging at a distance of about four feet above the top of the said roof; that the pretended insulation on the said wire was weather-proof only, not designed to, nor of any good to, protect human beings coming in contact with the same, from the force of any electric current the said wire might carry; that the defendants for long prior to the said day well knew that, or could by the exercise of ordinary diligence have known that at the point where plaintiff touched the said wire, as hereinafter set out, the same was, and plaintiff alleges that the same was, by the said defendants negligently permitted to have no insulation at all at a certain joint therein.

That on the said day and for long prior thereto with full knowledge in them the Missouri River Power Company

negligently and intentionally made the said roof unsafe and dangerous to all persons going over the same and on the said day the said Missouri River Power Company did negligently, willfully, and intentionally, make the said roof dangerous to all persons thereon and did then and there negligently and carelessly use a certain copper wire insufficiently, carelessly and negligently insulated and negligently charged by the defendant Missouri River Power Company with a large and dangerous current of electricity, to-wit, about 2,500 volts, while the said wire was hanging at a distance of about four feet above the said roof where plaintiff was sent and was on said day, that the said Missouri River Power Company before the said day, well knew that plaintiff and many other servants of Colusa Parrot Mining and Smelting Company would in the course of their employment go upon the said roof and come in contact with the said wire, and well knew prior to the said date that the said wire was hanging at a distance of about four feet and above the said roof and that it was insufficiently and negligently insulated, and that the Missouri River Power Company was charging it with electricity and was going to charge it with electricity on the said 12th day of July in quantity aforesaid, or the said Missouri River Power Company could by the exercise of ordinary diligence have known, that the said wire was so charged by it and so negligently and insufficiently insulated and so hanging at a distance of about four feet above the top of the said roof. That the pretended insulation on said wire was weather-proof only, not designed to nor of any good to protect human beings coming in contact with the same from the force of any electric current the said wire might

carry. That the Missouri River Power Company for long prior to the said day well knew that, or could by the exercise of ordinary diligence, have known that at the point where plaintiff touched the said wire as hereinafter set out, the same was, and plaintiff alleges that the same was negligently permitted by said defendant to have no insulation at all at a certain joint therein.

XI.

That on or about the said 12th day of July, A. D. 1904, the said plaintiff, being upon the said roof, at the command of his master as aforesaid, and without any negligence on his part and in the exercise of all care on his part, being ignorant of the danger of touching the said wire, inadvertently with his left hand took hold of the said wire, insufficiently and negligently insulated by the defendants as aforesaid and charged with electricity by the defendants as aforesaid; that immediately the said current of electricity passed through the body of the plaintiff into the said roof, the same being of iron and a good conductor of electricity, and the plaintiff was thereby grievously burned throughout his entire body, and the fingers of his left hand, in contact with the said wire were burned well nigh off, and plaintiff's feet in contact with the said roof were burned, and the muscles throughout plaintiff's entire body were burned and made sick and sore, and plaintiff by reason of the burnings inflicted on him by the defendants, as aforesaid, suffered great pain and anguish, and was made sick and sore and was thereby rendered unconscious and in a dying condition, and thereby all of the muscles in plaintiff's body were weakened; and thereby

plaintiff's stomach, which was before that strong, became and was made weak and impaired, and plaintiff has from the said injuries pains through his stomach; and thereby large swellings on plaintiff's feet were caused, and plaintiff's feet weakened; and that all of the said injuries to plaintiff are permanent in their nature; and thereby plaintiff's life, as he is informed by his surgeon and believes, has been shortened, and that while plaintiff had an expectancy of forty years of life before the said injury, he is informed by his surgeon and believes that his life will not now last more than two or three years, and this by reason of the said burns.

That just before the said burnings so inflicted on him by defendants, plaintiff was a strong and able-bodied man, sober and industrious, aged 26 years and four months only, capable of earning and earning one thousand dollars per year; that since said burnings so inflicted on him by defendants he has not been able to earn any money, and is informed and believes and alleges that he will never be able to do any more work or earn any more money.

That by reason of the said burnings and negligent acts of the defendants as herein set out, the defendants have damaged plaintiff in the sum of fifty thousand dollars.

Wherefore plaintiff demands judgment against the said defendants in the sum and for the sum of fifty thousand dollars, and for costs of suit.

H. L. MAURY,
Attorney for Plaintiff.

State of Montana, County of Silver Bow.—ss.

Thomas Monahan, being first duly sworn, on his oath

does say, that he is the plaintiff in the foregoing amended complaint named, that he has read the said amended complaint, and that of his own knowledge the same is true.

THOMAS MONAHAN.

Subscribed and sworn to before me this 5th day of January, 1905.

[Notarial Seal.] E. B. HOWELL,

Notary Public in and for Silver Bow County, Montana.

Service of the said amended complaint admitted and copy thereof received this 5th day of January, 1905.

M. J. CAVANAUGH and
CHARLES MATTISON,
Attorneys for Butte Electric and Power Company. and Montana Power Transmission Company.

W. M. BICKFORD,
GEORGE F. SHELTON,
Attorneys for Colusa Parrot Mining and Smelting Co.'

And the said motion to strike the amended complaint from the files herein is in words and figures as follows, to-wit:

'(Title of Court and Cause.)

MOTION.

Now comes the above-named Colusa Parrot Mining and Smelting Company, and moves the Court to strike from the files the amended complaint filed herein for the reasons following, to-wit:

That the said amended complaint, so-called, was filed without any notice of application to amend the complaint being served or given to the defendant; that the said plaintiff had no right or authority to amend his said complaint as of course; that his serving of the said amended complaint and filing of the same was contrary to the rules of this Court, to-wit, Rule 44 of the Rules of this Court; and the same is wrongfully and improperly among the files of this Court, and should be stricken therefrom.

Dated this 21st day of January, 1905.

W. M. BICKFORD,

GEORGE F. SHELTON,

Attorneys for Defendant, Colusa Parrot Mining and Smelting Co.

I hereby certify that in my opinion the foregoing motion is well founded in point of law.

GEORGE F. SHELTON,

Of Counsel for Defendant, Colusa Parrot Mining and Smelting Co.

Service of the foregoing motion accepted, and copy received, this 21st day of January, 1905.

H. L. MAURY,

Attorney for Plaintiff.'

Which offer was by the Court rejected, and the objection of counsel for plaintiff thereto sustained; to which ruling of the Court counsel for defendant then and there excepted."

17. The Court erred in receiving and filing the verdict of the jury in said cause.

18. The Court erred in entering judgment for the plaintiff on the verdict.

CONTENTIONS OF PLAINTIFF IN ERROR.

I.

The facts stated in the complaint are insufficient to constitute a cause of action against the defendant below, in that it appears from the face thereof that the plaintiff below was guilty of contributory negligence, and that the negligence of the defendant, if any, was not the proximate cause of the injury complained of. The objection of the defendant to the introduction of any evidence in the case, on the ground of the insufficiency of the complaint, should, therefore, have been sustained.

II.

The admission of testimony on the part of two of the witnesses for plaintiff below concerning the condition of the premises at a time nearly two years after the accident complained of occurred, the premises being actually in a different condition at the two times owing to a fire which intervened, was error prejudicial to the defendant below, such evidence being incompetent, irrelevant, and immaterial, on the particular ground of being too remote to have any probative value.

III.

In an action for personal injuries based upon a master's negligence in failing to provide a safe place in which his servant is to work, it is improper, and error prejudicial

to the defendant, to admit opinion testimony as to the "best" or "best known" appliances which might have been used.

IV.

In an action for personal injuries, based upon a master's negligence in failing to provide a safe place in which his servant is to work, the premises in question being fully described to the jury, a model thereof being in evidence, the opinions of witnesses as to the safety or danger of the premises are unnecessary and improper, and are an infringement upon the province of the jury.

V.

In the present action, evidence of the probable expectancy of life of the plaintiff, and evidence as to the cost of an annuity of a certain amount for such period of expectancy, were inadmissible as a basis of the measure of damages to which plaintiff was entitled.

VI.

In an action for personal injuries based upon a master's negligence in failing to provide a safe place in which his servant is to work, and specifically in failing properly to insulate certain electric wires, testimony as to the merit or lack of merit of weather-proof insulation of electric wires is inadmissible in an action, such as the case at bar, where the particular point of a wire at which the plaintiff took hold of the same was specifically identified to the jury by means of the model in evidence, and where the uncontradicted testimony in the case showed that the wire at

that point was insulated with rubber insulation covered with stick or friction tape.

VII.

Where an action is dismissed by agreement, in open court, of the respective parties thereto, through their respective counsel, said agreement appearing in the minutes of the court, and showing that the action was to be dismissed and that each party was to pay his own costs, such dismissal operates as a *retraxit*, and is a complete bar to the maintenance of a subsequent action between the same parties based upon the same state of facts. The rejection, therefore, of the defendant's offer of proof of the proceedings in the former action (No. 261) to show such *retraxit* was erroneous.

BRIEF AND ARGUMENT.

I.

THE FACTS STATED IN THE COMPLAINT ARE INSUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AGAINST THE DEFENDANT BELOW, IN THAT IT APPEARS FROM THE FACE THEREOF THAT THE PLAINTIFF BELOW WAS GUILTY OF CONTRIBUTORY NEGLIGENCE, AND THAT THE NEGLIGENCE OF THE DEFEDANT, IF ANY, WAS NOT THE PROXIMATE CAUSE OF THE INJURY COMPLAINED OF. THE OBJECTION OF THE DEFENDANT TO THE INTRODUCTION OF ANY EVIDENCE IN THE CASE ON THE GROUND OF THE INSUFFICIENCY OF THE COMPLAINT SHOULD, THEREFORE, HAVE BEEN SUSTAINED.

In his complaint (Record, page 6) the plaintiff, while professing ignorance of the danger of touching a wire carrying electricity, and also professing the exercise of due care on his part, proceeds to allege that while on a corrugated iron roof during the performance of certain duties, he "inadvertently took hold of the said wire so insufficiently and negligently insulated by the defendant as aforesaid, etc." This language, we submit, is an express admission by the plaintiff that he was negligent.

In the case of Davis v. Steuben School, 50 N. E. 1, 19 Ind. App. 694, the word "inadvertence" is defined as a lack of heedfulness or attention.

The plaintiff, then, by his own statement, without exercising heedfulness or attention—in other words, without exercising due care—proceeded to seize hold of an electric power wire, which was obvious to anyone going on the roof, it being, according to plaintiff's statement, only four feet above the roof, and, we submit, the dangerous character of the wire being known to the plaintiff, for the reason that it was plainly to be seen that it was an electric power wire, and it being a matter of common knowledge that it is not using due care to seize hold of an electric wire, particularly when one is standing upon a corrugated iron roof.

It is negligence *per se* purposely to take hold of an electric wire.

> Lexington R. Co. v. Fair's Admr., (Ky.) 71 S. W. 628.

If the plaintiff knew of the proximity of the wire and

the danger thereof, and, because preoccupied in any way, forgot about the danger, and his forgetfulness and failure to remain as alert and watchful as a reasonably prudent person should do under the circumstances, caused him to be injured, there can be no recovery.

> Buckley v. Westchester, etc., Co., 87 N. Y. Supp. 763, 767.

Equally negligent would it be for one to seize hold of an electric wire without noticing what he was doing. Supposing it is the duty of a master to provide a reasonably safe place in which his servant may work, and supposing the master does allow a machine with blades or cogs to be exposed, or, for that matter, an uninsulated electric wire, can it be seriously contended that the master is liable for an injury to a servant who carelessly,—inadvertently, if you please,—places his hand between the cogs or blades, or seizes hold of the uninsulated wire? We say that the plaintiff had knowledge, or its equivalent, the means of knowledge, of the dangerous character of the wire, which was in plain sight; and we believe that this statement is perfectly reasonable and justifiable. It is just as much a matter of common knowledge in these times that to seize hold of an electric wire, and particularly a large power wire like that in question, is the incurring of an obvious danger or risk,—a danger so apparent that the servant would not necessarily be entitled to a specific warning of it. If a master has a machine which at high speed might fly to pieces and injure a servant, the servant would be entitled, of course, to a warning as to such danger, if the danger were known to the master; but if the master places

a servant before a machine with cog wheels or blades which are perfectly apparent to the observer, it seems impossible seriously to contend that a human being endowed with senses would need a warning against placing his hands or feet between the cogs or blades. Electric wires, even electric power wires, being in these times as commonly known as almost any fact of life, it may be reasonably said that where a plaintiff has knowledge of the existence of the wire, he also has knowledge of the danger of touching or seizing hold of said wire; and, therefore, an allegation of ignorance in that regard is futile and without meaning. There is no contention that the wire itself was concealed; it was perfectly obvious to any observer going upon the roof; and there is no contrary allegation on this point in the complaint.

A further objection to the complaint is that there is alleged no proper causal connection between the negligence of the defendant, if any, in having an improperly insulated wire on the roof and the injury complained of. The wire mentioned in the complaint was on top of a building; the roof of this building was not an ordinary thoroughfare; and the mere fact that the defendant might anticipate that some time in future years somebody might go on that roof for the purpose of altering or repairing the same, is not of itself sufficient to show that the defendant must be held to have anticipated that a person going upon that roof would seize hold, inadvertently or otherwise, of the perfectly apparent power wire, and thus become injured. We submit that even if the wire had not been insulated at all, it is questionable whether the defendant would be liable

in this case, the injury complained of being too remote, and there being no legal causal connection between the condition of the wire and the damage to the plaintiff. The wires being stretched across a roof, surely if the defendant is held to have anticipated that a person would go upon such roof, he must also be held to have anticipated that such person would, under the circumstances, use extreme caution and watchfulness in looking where he was going, and not seize hold of the wire. In other words, the damage complained of in this action is not such a damage as any reasonable man would be bound to anticipate, and is, therefore, not the proximate result of any acts or omissions of the defendant.

The master is not bound to guard against accidents not reasonably to be anticipated.

Fulton v. The Co. (N. J.), 54 Atl. 561.

In Consolidated Gas Co. v. Brooks (N. J.), 53 Atl. 296, it was held that where a painter on the balcony of a house comes in contact with a wire of an electric company he could not recover against the company.

In Clark v. Barnes, 37 Hun. 389, it was held that the owner of a printing establishment is not liable to an employee who sustains an injury by falling on a slippery floor against an uncovered cog of a printing press.

To the same effect are:

Reinig v. Broadway Co., 49 Hun. 269; 1 N. Y. Supp. 907.

Moore v. Pa. Ry. Co., 167 Pa. 495; 31 Atl. 734;—— Where a plaintiff, being directed to shovel snow off of a

roof, and jumping one side to avoid a snow-drift, fell into an open skylight and was injured, it was held that he could not recover.

In Elliott v. Alleghany Co., 204 Pa. St. 568, 54 Atl. 278, the plaintiff, being engaged as a painter, fell through or with a ladder that slipped from its proper position while he was using it. In his effort to save himself, as he fell he reached out and clutched at an electric wire which was supported from brackets at the side of the building, and he was shocked and lamed from the alleged defectively insulated condition of the wires. It was undisputed that the defendant was in nowise responsible for the slipping of the ladder, WHICH WAS THE ORIGINATING CAUSE OF THE PLAINTIFF'S FALL. The trial court gave a binding instruction in favor of the defendant on the trial THAT THE PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES WAS HIS FALL FROM THE LADDER, and not his grasping of the wire in the line of the fall; and this instruction was sustained on appeal.

Comparing the case last cited with the case at bar, it is apparent that our case is even stronger, for here there is simply an allegation that the plaintiff inadvertently seized hold of the wire, whereas in Elliott v. Alleghany Co., supra, it was apparent that the plaintiff grasped the wire in an instinctive effort to save himself from a fall. In either case, whatever was the cause of the plaintiff's grasping the wire, it appearing that the defendant was in nowise responsible for this act, the proximate cause of the damage to the plaintiff, even though that damage happened to be a burn or

shock from an electric wire, was not the condition of the wire or the fall.

In Assop v. Yates, 2 Hurlst. & N. (Eng.) 768, 27 L. J. Exch. (n. s.) 156, the declaration alleged that the master negligently erected a hording in a street and left a machine in a position in which it was likely to cause danger to the workmen, and that a cart accidentally ran against the hording and knocked down the machine against the plaintiff. It was held that the declaration did not show that the injury was the proximate result of the negligence specified.

The fact that the hanger of a sliding door is defective and consequently difficult to move, is not, in law, the proximate cause of an injury to the leg of an employee who, while moving it with the help of a co-employee, loses his balance and falls from a stool which he has mounted in order to be in the most advantageous position for pushing it.

Connolly v. American Express Co., 87 Me. 352; 32 Atl. 965.

Sending an employee away and substituting a smaller and weaker man in his place, is not the proximate cause of an injury to another employee from the fall of a post which was being set in position, where the post did not fall because of the substitute's weakness, but because of his slipping, through the character of the ground on which he was obliged to stand.

In Greer v. Turnbull, 19 Scotch Session Cases (4th Series) 21, it was held that no causal connection between

the negligence charged and the injury complained of is shown by a complaint in which the abnormal risks specified were that a passage of only nineteen inches in width was provided between a crane and a deep molding pit, and that the pit was left uncovered, where the injury was alleged to have been received owing to the fact that the plaintiff stumbled while walking along the narrow passage and in an endeavor to regain his balance caught his hands in the wheel of the crane. The ruling of the Court was based upon the theory that the stumbling was the proximate cause of the accident; that as the passage was not insufficient for the purpose for which it was used, and was not encumbered or obstructed through the defendant's fault, the stumbling must have been caused by pure accident, or by negligence on the plaintiff's part, and that it did not appear that the result would have been different if the pit had been covered. The suggestion that if the pit had been covered, the plaintiff would not have grasped the crane for support, but would have allowed himself to fall on the cover, was rejected as being mere speculation, and not averment; but it was declared that if this had been averred the complaint would still have been bad.

In Holloran v. Union Iron Co., 133 Mo. 470, 35 S. W. 260, a servant engaged in moving a derrick across the uncovered girders on the first floor of a building, after the master had promised to furnish more planks, fell into the cellar by reason of his foot slipping from the girder upon which he had placed it without apprehending any danger therefrom. The Court held that no action could be maintained since, under the circumstances, the fall was not

caused by the insufficiency in the number of the planks, or a defect in the crowbar or the derrick, but simply by a miscalculation on the plaintiff's part as to his position, and his accidental slipping from the girder.

Again, we invite comparison by the Court of the foregoing decision with the case at bar. What caused the plaintiff to seize hold of the wire? The complaint is silent on this point (although, if we may be permitted the digression, it developed that the plaintiff slipped on the iron roof and probably seized the wire in attempting to save himself from a fall). Certainly there is nothing in the complaint from which one might justly infer that the seizing of the wire was in any way due to the negligence of the defendant. It must be deemed, therefore, to have been either an accident or else the result of the plaintiff's own negligence. On either basis, the plaintiff cannot recover, since whatever caused him to seize hold of the wire must be deemed the proximate cause of the damage, and not the fact that the wire may have been defectively insulated.

For the reason, therefore, that the complaint exhibits a case of contributory negligence on the part of the plaintiff, and also fails to show any causal connection between any acts or omissions of the defendant and the injury complained of, we submit that the objection to the introduction of any evidence in the case should have been sustained.

II.

THE ADMISSION OF TESTIMONY ON THE PART OF TWO OF THE WITNESSES FOR PLAINTIFF BELOW CONCERNING THE CONDITION OF THE

PREMISES AT A TIME NEARLY TWO YEARS AFTER THE ACCIDENT COMPLAINED OF OCCURRED, THE PREMISES BEING ACTUALLY IN A DIFFERENT CONDITION AT THE TWO TIMES OWING TO A FIRE WHICH INTERVENED, WAS ERROR PREJUDICIAL TO THE DEFENDANT BELOW, SUCH EVIDENCE BEING INCOMPETENT, IRRELEVANT, AND IMMATERIAL ON THE PARTICULAR GROUND OF BEING TOO REMOTE TO HAVE ANY PROBATIVE VALUE.

The witnesses Elliott and Sullivan (Record, pages 50, 51, 87, and 119) were allowed, over the objection of the defendant, to testify as to the relative condition of the premises nearly two years after the accident occurred; and it was further positively in evidence that the condition of the premises had been considerably changed in the meantime, the witness Elliott admitting on his cross-examination that he was not certain how much it had been changed. The bare statement of this contention seems to us sufficient to justify it, without the citation of authorities. It is simply a question of the remoteness of the time concerning which the witnesses were questioned; and on this ground of remoteness, it is apparent that the evidence is wholly irrelevant and immaterial. It could not possibly have any probative force in proving the negligence of the defendant at a time two years earlier. The promise of the plaintiff's attorneys to show a similarity in the condition of the premises at the different times was not fulfilled; and if it had been, we still submit that evidence regarding the condition of the premises nearly two years after the accident occurred

is wholly irrelevant, and that the admission thereof was prejudicial to the defendant below.

III.

IN AN ACTION FOR PERSONAL INJURIES BASED UPON A MASTER'S NEGLIGENCE IN FAILING TO PROVIDE A SAFE PLACE IN WHICH HIS SERVANT IS TO WORK, IT IS IMPROPER, AND ERROR PREJUDICIAL TO THE DEFENDANT, TO ADMIT OPINION TESTIMONY AS TO THE "BEST" OR "BEST KNOWN" APPLIANCES WHICH MIGHT HAVE BEEN USED.

The point here brought up is clearly established by the authorities.

The plaintiff in a personal injury suit has no right to bring before the jury a comparison between the appliances actually used by the defendant and appliances which he might possibly have used. A defendant is not bound to change the condition of his premises every time a new appliance is invented or placed upon the market, even if the new appliance is better and safer than the one he has in use. We submit that if he used ordinary and reasonable care at the time he installed the appliances, he has a right to leave the premises in the same condition, and subsequent employees must take the premises as they find them.

In Diamond, etc., Co. v. Giles, (Del.) 111 Atl. 189, it was held that:

> "No employer by any implied contract undertakes that his buildings are safe beyond a contingency, OR EVEN THAT THEY ARE AS SAFE

AS THOSE OF HIS NEIGHBOR'S, OR THAT ACCIDENTS SHALL NOT RESULT TO THOSE IN HIS SERVICE FROM RISKS WHICH OTHERS WOULD GUARD AGAINST MORE EFFECTUALLY THAN IS DONE BY HIM. NEITHER CAN A DUTY REST UPON ANYONE WHICH CAN BIND TO SO EXTENSIVE A RESPONSIBILITY."

The question whether particular appliances provided by a master are proper and suitable is to be determined by their actual condition, and not by comparing them with other appliances.

Wood v. Heiges, 83 Md. 257; 34 Atl. 872.

Evidence which merely tends to show that the particular accident which caused the injury might not have happened if a particular precaution had been taken, goes for nothing in considering the question of legal liability on a charge of negligence.

Augerstein v. Jones, 139 Pa. 183; 21 Atl. 24.

In Northern C. R. Co. v. Husson (Pa.), 47 Am. Rep. 690, the Supreme Court of that State used the following language:

> "We cannot agree that the risk to which an employer subjects his employee suffices to impose liability upon the former, as being extraordinary in character, merely because the injury in a particular case might possibly have been prevented by some different device."

See, to the same effect:

Glover v. Meinrath, 133 Mo. 292; 34 S. W. 72.

Chicago, R. I. & P. R. Co. v. Lonegan, 118 Ill. 41; 7 N. E. 55.

Rush v. Mo. Pac. R. Co., 36 Kansas 129; 12 Pac. 582.

The master is not bound to furnish the best known or conceivable appliances, but must provide such as are reasonably and adequately safe.

Jenney Electric Light & Power Co. v. Murphy, 15 West Rep. 507.

Pa. Co. v. Whitcomb, 9 West Rep. 825; 111 Ind. 212.

Hickey v. Taffe, 105 N. Y. 26.

Allison Mfg. Co. v. McCormick, 118 Pa. 519.

Burns v. Chicago, M. & S. P. R. Co., 69 Ia. 450.

Sherman v. Menominee, etc., Co., 1 L. R. A. 174; 72 Wis. 122.

Kehler v. Schwenk, (Pa.) 13 L. R. A. 374;——

Where the Court held that the master has absolute discretion in selecting which of several styles of apparatus in common use he will use in his business; and he cannot be made to respond in damages to an employee injured while using the apparatus selected on the ground that some other style might, under the circumstances, have been safer.

IV.

IN AN ACTION FOR PERSONAL INJURIES BASED UPON A MASTER'S NEGLIGENCE IN FAILING TO PROVIDE A SAFE PLACE IN WHICH HIS

SERVANT IS TO WORK, THE PREMISES IN QUESTION BEING FULLY DESCRIBED TO THE JURY, A MODEL THEREOF BEING IN EVIDENCE, THE OPINIONS OF WITNESSES AS TO THE SAFETY OR DANGER OF THE PREMISES ARE UNNECESSARY AND IMPROPER, AND ARE AN INFRINGEMENT UPON THE PROVINCE OF THE JURY.

In this case the premises were fully described to the jury, and a model thereof was introduced in evidence by the plaintiff. Such being the case, the question of the danger or safety of the premises was absolutely a matter for the consideration of the jury alone, and opinions on that question should have been excluded. Admitting such opinions could but accumulate to the prejudice of the defendant. Such questions were asked of the witness Elliott (Record, page 57), of the witness Aiken (Record, page 110), of the witness Sullivan (Record, page 118), and of the witness Keefe (Record, page 124).

"Ordinarily, the question whether a place was dangerous, or an instrument was deadly, is one which is solvable by the jury after the subject-matter has been properly described by the witness, and accordingly his conclusions or deductions are not admissible."

> Enc. of Evidence, Vol. 5, page 683, citing Holmes v. State, 100 Ala. 80, 14 So. 864,

where it was held that it is not proper to allow a witness to testify that a hoe which has been fully described to the jury was of such weight and strength as to enable a person

in whose hands it was to kill a man within striking distance.

In Enright v. R. Co., 33 Cal. 236, opinions as to whether a fence was sufficient to turn cattle were excluded.

In Shafter v. Evans, 53 Cal. 33, opinion as to whether a cattle corral was safe or not was excluded.

In Redfield v. R. Co., 112 Cal. 220, testimony as to whether an electric wire could be safely operated by one man was excluded.

In Smuggler Co. v. Broderick, 25 Colo. 16; 53 Pac. 169, opinion evidence as to whether a place in a mine was a safe place to work in was excluded.

To the same effect are:

Tolson v. Coasting Co., 17 D. C. 44; and

District of Columbia v. Haller, 4 D. C. App. 405.

In Mayor v. Wood, 114 Ga. 370, 40 S. E. 239, opinion evidence as to whether a street was dangerous or not was excluded.

See, also, to the same effect:

Chicago & N. W. R. Co. v. Moranda, 108 Ill. 583.

Springfield R. Co. v. Welsh, 155 Ill. 511; 40 N. E. 1034.

Albion v. Herrick, 90 Ind. 549.

Bills v. Ottumwa, 35 Ia. 111.

Cooper v. Central R. Co., 44 Ia. 140.

Parsons City v. Lindsay, 26 Kansas 431.

Hill v. R. R. Co., 55 Me. 444.

Mayhew v. Mining Co., 76 Me. 111.

Raymond v. Lowell, 6 Cush. 531.

Nowell v. Wright, 3 Allen 170.

Simmons v. Steamboat Co., 97 Mass. 371.

Edwards v. Worcester, 172 Mass. 104; 51 N. E. 447.

Detzur v. Brewing Co., 119 Mich. 282; 77 N. W. 948.

Morris v. Ins. Co., 63 Minn. 420.

Moore v. Townsend, 76 Minn. 64; 78 N. W. 880.

Koons v. R. Co., 65 Miss., 597.

Metz v. Butte, 27 Mont. 506; 71 Pac. 761.

Cincinnati, etc., Co. v. May, 20 Ohio 223.

Stillwater Turnpike Co. v. Coover, 26 Ohio 521.

Chan Sing v. Portland, 37 Ore. 68; 60 Pac. 718.

Long v. R. Co., 126 Pa. 143; 19 Atl. 39.

Atl. Ave. R. Co. v. Van Dyke, 72 Fed. 458.

Crane Co. v. Columbus Construction Co., 73 Fed. 984.

New York, etc., Co. v. Blair, 79 Fed. 896.

Hunt v. Kile, 98 Fed. 49.

Houston v. Brush, 66 Vt. 331; 29 Atl. 380.

So. R. Co. v. Mauzy, (Va.), 37 S. E. 285.

Reynolds v. Shanks, 23 Wis. 307.

Kelley v. Fond du Lac, 31 Wis. 185.

Lawson v. R. Co., 64 Wis. 459; 24 N. W. 618.

V.

IN THE PRESENT ACTION, EVIDENCE OF THE PROBABLE EXPECTANCY OF LIFE OF THE PLAINTIFF AND EVIDENCE AS TO THE COST OF AN ANNUITY OF A CERTAIN AMOUNT FOR SUCH PERIOD OF EXPECTANCY, WERE INADMISSIBLE AS A BASIS OF THE MEASURE OF DAMAGES TO WHICH PLAINTIFF WAS ENTITLED.

In this connection, it is to be clearly noted at the outset that the plaintiff in his complaint alleges that as a result of the alleged accident his life has been shortened. Such being the case it is hard to conceive of any ground upon which evidence of the expectancy of life of a man of the age of plaintiff could be in any wise relevant or material in the case. The very allegation and claim of the plaintiff does away with any grounds which might have existed for the consideration of the plaintiff's probable expectancy of life. Of what value could the mortality tables, which are based upon a computation of the average expectancy of a given number of human lives, be, in relation to the question of the measure of damages to the plaintiff in the present instance, when the plaintiff himself takes his own case out of the purview of the mortality tables by specifically stating that his period of life has been shortened? Surely the plaintiff cannot be held to be entitled to damages in such an amount that there will be money left for his estate after he is dead, and such would be the result if the jury is allowed to use his entire probable expectancy as a basis upon which to compute his damages.

We submit, therefore, that under any view of the case, evidence as to plaintiff's expectancy of life is wholly irrelevant and immaterial. But even if the plaintiff had not inserted the allegation mentioned in his complaint, we still insist that evidence of the plaintiff's expectancy of life, as the same was introduced and used in the case at bar, was improperly admitted, since it was introduced solely for the purpose of making a basis for an accurate mathematical calculation of an annuity which would bring to the plaintiff, without any further effort whatever on his part, a fixed and even annual income for each and every year of such period of expectancy.

In Grant v. U. P. R. Co., 45 Fed. 683, 684, Shiras, Judge, in holding that the plaintiff's expectancy might be considered in the case, along with other things, held that its use was to be carefully qualified. Regarding this question he uses the following language:

> "In such cases as this you are entitled to take into account the facts surrounding the injured party, his age, possible expectancy of life, and the position he occupied, and the amount of money he earned. When a person is engaged as a laborer, and his wages are so much, of course the money loss to him is not so great as if he occupied a higher position, and had higher ability to earn money. A man who can earn a thousand dollars a year, and is deprived of his ability to do so, does not, of course, suffer as great pecuniary loss as though he were able to earn $2,000. Still, as I have said, all the parties can do is to bring in evidence showing what the facts and circumstances are in each particular case,—the age of the plaintiff, his habits of life, his ability to earn money, his occupation, and the effect upon these of the injury he has received. Evidence

has been introduced showing his expectancy of life. Now, it is not understood that you shall take the expectancy of life of a man, and then figure up that he has been deprived of his ability to earn so much money for each one of those years. This would not be a fair way of estimating the damages, because, as we all know, it is impossible to determine whether a man will live out this expectancy of life or not. These insurance tables are based upon the probabilities of the average human life. It may be this man, if he had not received the injury, would not have lived a year, and he may live longer than his expectancy of life. There are so many uncertainties and contingencies in human life. We cannot say that this man would have continued to earn $50 a month; and, on the other hand, he might have earned a larger amount. So you cannot take this and figure it out on a mathematical basis; but, taking all these facts into account, and remembering the uncertainties and contingencies of human affairs, it is for the jury to determine the fair lump sum which will compensate the plaintiff for the pecuniary damage caused him by the injuries he has received."

The evidence in the case at bar showed that plaintiff's injury resulted merely in a partial disability to prosecute his work. And in Honey Grove v. Lancaster (Texas), 50 S. W. 1053, it was held that where the injury is to the plaintiff's hand, and his ability to prosecute his business is only partially affected thereby, evidence of his probable expectancy of life is inadmissible.

In Chicago, etc., R. R. Co. v. Johnson, 36 Ill. App. 564, it was held that evidence of plaintiff's expectancy is inadmissible to prove how long the plaintiff is likely to suffer.

Now, with reference to the question of the annuity: The

evidence in the case tended in no way to show a total disability to labor on the part of the plaintiff. We, therefore, contend that, as a basis of the measure of damages, the computation of a fixed and even annuity which will be paid to the plaintiff each and every year of his period of expectancy is illogical and dangerous. Even though the plaintiff's earning capacity may be impaired, it seems beyond reason to contend that the plaintiff's earning capacity would continue at exactly the same point of efficiency during his entire period of expectancy, until he is dead. Is it reasonable to hold that a person from sixty to seventy years old will earn exactly as much as a man twenty-six years old? Is there not a very long period of years during which his earning capacity is on the decline? Particularly as in this case, where the person was not engaged in any professional or mental labor, but simply in manual labor? The jury can, of course, consider, in a personal injury case, future damages to the plaintiff, but we submit that the expectancy of life of the plaintiff can be properly used only in the manner indicated by Shiras, Judge, in Grant v. Union Pacific Railroad Co., supra. In short, the capitalization of the plaintiff's earnings, or probable earnings, during his entire period of expectancy, is an unjust and improper method of estimating the plaintiff's damages in a personal injury suit.

In Gregory v. N. Y., etc., Ry. Co., 8 N. Y. Supp. 525, at 528, the Court said:

> "The counsel for the defendant presents another serious objection to the charge of the learned judge, in which, in effect, he suggested to the jury a capitalization of the plaintiff's earnings, and to give

him a sum which would not only be equal to what they have been in previous years, but would be sufficient to support him from year to year. 'The question presented by this objection was considered and decided in the case of Railroad Co. v. Burke, 9 Amer. & Eng. R. Cas. 369. In that case the Court instructed the jury that they might ascertain the value of the plaintiff's services to himself before the injury and the value of his services since, ascertain the difference, and then give such a sum as would at legal interest produce a sum equal per annum to that difference; and this was held to be error. The Court said: 'Resulting from the application of that rule, appellant would not only be required to pay the annual difference between the value of appellee's services before and since the injury, but, in addition, a gross sum sufficient to produce that difference at the legal rate of interest.' The learned justice in the case at bar, when exception was taken to these suggestions to the jury, said that they were given to them as an illustration. But it is very clear that it was misleading, and the learned counsel for the defendant excepted to the illustration particularly."

In Morrison v. Long Island R. Co., 38 N. Y. Supp. 393, the following instruction was given upon the question of damages:

"Upon the question of damages, the Court instructed the jury as follows:

" 'If you find for the plaintiff on these issues, then you will give to him a fair sum of money to compensate him for the loss of earning power,—whatever he might have earned more than he can earn now by reason of having lost his eye,—his fair compensation in that regard; and you are to determine as best you can how much he could earn before he lost his eye, and how much he can earn since he lost his eye; that would be his loss of earning power.

And when you ascertain that, you have a right to fix a sum the annual income which that earning power would produce to him.'

"And to this instruction the defendant excepted."

With reference to this instruction, at page 395, the Court said:

> "The charge in respect to the rule to be applied in determining the plaintiff's damages was plainly erroneous. There is no doubt as to the meaning of the learned judge. He very plainly intended to permit the jury to capitalize the plaintiff's loss of earning power. That rule for measuring damages cannot be sustained. Gregory v. Railroad Co., 55 Hun. 303, 8 N. Y. Supp. 525."

In Alabama, etc., R. Co. v. Carroll, 84 Fed. 772 (Circuit Court of Appeals, Fifth Circuit), it was held that the measure of damages for an injury which deprived plaintiff of his earning capacity is not the amount he might probably earn during his expectancy of life, but the present value of such earning; and remarks in the argument of the counsel for the plaintiff stating the rule of damages to be that the plaintiff was entitled to what he might earn during his expectancy were held to be reversible error.

In St. Louis Ry. Co. v. Farr, 56 Fed. 994, at page 1000, the Court, after quoting remarks of plaintiff's counsel to the jury, which remarks were as follows:—

> "Now, gentlemen, any one of these figures are sustained by the evidence. It cannot be simply guesswork. And then you take into consideration his sufferings; what he has suffered, and what he will hereafter suffer. You cannot be doing an injustice. You will find what amount he could earn in a month, and then multiply that by twelve, and

> that by forty, and then you get the correct amount of the damages."

said:

> "To these remarks the defendant objected on the ground that this was an incorrect method of arriving at the measure of damages, and that the remarks were unfair, and tended to mislead the jury. The Court overruled the objection, and remarked, 'That is a fair argument.' This was a manifest error. The present value of the earnings of 40 years to come, if absolutely assured, is much less than 50 per cent. of their amount, at any rate of interest that prevails in the Indian Territory; and when it is considered how uncertain those earnings are, how many chances of disability, disease, and disposition condition the probable earnings of a young man, the rule announced is absurd. Nor was the vice of this argument, or of the Court's approval of it, anywhere extracted in the general charge. The Judge contented himself with the harmless remark, upon this branch of the case, that if the jury found for the plaintiff they should allow such a sum as would compensate him for his pecuniary loss sustained, or that he would hereafter sustain, by reason of the disabilities caused by his injuries, but that they should not assume that he was entirely incapacitated because he could not perform the duties of a brakeman, but should consider his power to earn money in other stations of life. He nowhere condemned the vicious and misleading rule for measuring the plaintiff's pecuniary loss which the plaintiff's attorney had laid down, and he had approved."

It seems plain that it would be unfair to put a defendant in the position of an insurance company guaranteeing that the plaintiff would live for the entire period of his expectancy, or, at any rate, guaranteeing him an absolute

and certain income, as large as he would make if he did live throughout such period.

What the plaintiff is entitled to is simply a fair compensation for his injuries sustained, and not a guarantee of a fixed income throughout his period of expectancy, which, aside from the injury complained of, he might or might not live through, such income being placed in his hands without the slightest further effort on his part.

But we further submit that the evidence concerning the annuity did not even come within the rules of decision in the occasional cases where such evidence has been admitted. While we do not in any way admit the propriety of the admission of such evidence in those cases, they lay down the rule that the only manner in which the annuity may be used as a basis of estimating damages is that the plaintiff is entitled, in case of permanent disability, to a sum which will purchase an annuity equal to the interest on the difference between the plaintiff's earning capacity before and after the injury, and *NOT* the principal sum which would produce that interest.

> Houston, etc., R. R. Co. v. Willis, 53 Tex. 318; 37 Am. Rep. 756.
>
> Baltimore & Ohio R. R. Co. v. Henthorne, 73 Fed. at 641.

The evidence as to plaintiff's expectancy and as to the cost of an annuity which would run through that period of expectancy, and the manner of introduction thereof, were objected to at the trial, and the admission thereof,

over such objection of the defendant, was, we submit, material and prejudicial error.

VI.

IN AN ACTION FOR PERSONAL INJURIES BASED UPON A MASTER'S NEGLIGENCE IN FAILING TO PROVIDE A SAFE PLACE IN WHICH HIS SERVANT IS TO WORK, AND SPECIFICALLY IN FAILING PROPERLY TO INSULATE CERTAIN ELECTRIC WIRES, TESTIMONY AS TO THE MERIT OR LACK OF MERIT OF WEATHER-PROOF INSULATION OF ELECTRIC WIRES IS INADMISSIBLE IN AN ACTION SUCH AS THE CASE AT BAR, WHERE THE PARTICULAR POINT OF A WIRE AT WHICH THE PLAINTIFF TOOK HOLD OF THE SAME WAS SPECIFICALLY IDENTIFIED TO THE JURY BY MEANS OF THE MODEL IN EVIDENCE, AND WHERE THE UNCONTRADICTED TESTIMONY IN THE CASE SHOWED THAT THE WIRE AT THAT POINT WAS INSULATED WITH RUBBER INSULATION COVERED WITH STICK OR FRICTION TAPE.

The above contention is self-explanatory. The plaintiff Monahan positively identified the spot at which he seized hold of the wire in question. That spot was at a joint. Elliott and other witnesses for the plaintiff testified positively that this joint was insulated with rubber insulation, the rubber being covered with stick or friction tape. It seems unnecessary to argue the point, therefore, that evidence as to whether weather-proof insulation, which may or may not have been on other portions of the wire which

plaintiff did not touch, was safe or not, is wholly irrelevant and incompetent of accomplishing anything except to mislead and confuse the jury. The objection of the defendant, therefore, to the introduction of such testimony by the witness Aiken should have been sustained.

VII.

WHERE AN ACTION IS DISMISSED BY AGREEMENT, IN OPEN COURT, OF THE RESPECTIVE PARTIES THERETO THROUGH THEIR RESPECTIVE COUNSEL, SAID AGREEMENT APPEARING IN THE MINUTES OF THE COURT, AND SHOWING THAT THE ACTION WAS TO BE DISMISSED AND THAT EACH PARTY WAS TO PAY HIS OWN COSTS, SUCH DISMISSAL OPERATES AS A *RETRAXIT*, AND IS A COMPLETE BAR TO THE MAINTENANCE OF A SUBSEQUENT ACTION BETWEEN THE SAME PARTIES BASED UPON THE SAME STATE OF FACTS. THE REJECTION, THEREFORE, OF THE DEFENDANT'S OFFER OF PROOF OF THE PROCEEDINGS IN THE FORMER ACTION (No. 261) TO SHOW SUCH *RETRAXIT* WAS ERRONEOUS.

With reference to the proposition that the plaintiff's action is barred by a *retraxit* entered in the former action (No. 261), upon substantially the same state of facts, we wish to point out to the Court, particularly, the fact that the only defect which the plaintiff apparently finds in the alleged *retraxit* is that the plaintiff's attorney, H. L. Maury, Esquire, had no authority under the law, either

of Montana or of the United States, to enter a *retraxit* which would be binding upon his client.

Code of Civil Procedure of Montana, section 398 reads as follows:

> "An attorney and counsellor has authority:
>
> "1. To bind his client in any steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the Court, and not otherwise."

We will refer the Court, for comparison, to section 283 of the Code of Civil Procedure of the State of California, the language of which is absolutely identical with the language of section 398 of the Montana Code of Civil Procedure. No case involving the specific point decided by the Supreme Court of Montana has come to our notice, but the Supreme Court of California, in considering the section in question, has held that although at common law an attorney had no authority to enter a *retraxit* under his general employment, under the statute he had this right, and that his client was bound by his entry of a *retraxit*. The language of the statute seems plain enough, but if construction is needed, we can safely assume that the Montana Court would follow the construction of the California Supreme Court. The Montana Court has followed the California Court in considering the same section with reference to an attorney's authority to compromise or accept less than the amount due, both Courts holding that he has not such authority under his general employment.

Harris, Admr., v. Root, 28 Mont. 168, citing

Preston v. Hill, 50 Cal. 43.

That the California rule to the effect that an attorney has full authority to enter a *retraxit* in a case is firmly established is shown by the decisions of the Supreme Court of that State in the case of Merritt v. Campbell, 47 Cal. 542, and in the case of Westbay v. Gray, 116 Cal. 660, 666, 48 Pac. 800. In the latter case the Court said:

> "A *retraxit* occurred at common law when a plaintiff came into court in person and voluntarily renounced his suit or cause of action, and when this was done and a judgment was entered in favor of defendant the plaintiff's cause of action was forever gone. (3 Blackstone's Commentaries, 296.)
>
> "*UNDER OUR LAWS THIS AUTHORITY WILL BE DEEMED TO HAVE BEEN CONFERRED UPON THE ATTORNEY OF RECORD IN A CAUSE.* (Board of Commissioners v. Younger, 29 Cal. 147; 87 Am. Dec. 164; Merritt v. Campbell, 47 Cal. 542.) In the case last cited the former cause had been by agreement of the parties dismissed, the judgment reading as follows: 'By agreement it is ordered by the Court that the cause be dismissed; each party paying his own costs.'"

In that case (Merritt v. Campbell, 47 Cal. 542) the Court used the following language:

> "A judgment of dismissal, rendered upon the oral agreement of the parties in open court, with a stipulation that each party pay his own costs, is a bar to another suit afterward brought upon the same cause of action."

And, in determining this proposition, the Court said:

> "It is an undoubted rule that a nonsuit, suffered for any cause, is not a bar to an action subsequently brought upon the same cause of action. To operate such a bar the judgment must have been one rendered upon the merits, or the proceedings in the

former action must have amounted to a *retraxit*, as known in suits at common law, which, being 'an open and voluntary renunciation of his suit in court,' the plaintiff was not left at liberty to afterward renew it.

"A *retraxit* at common law, it is true, must have been the act of the plaintiff appearing in his own proper person in court, and not for that purpose by his attorney. But under our statute concerning attorneys and counselors at law (Sec. 9) this authority must be considered to be conferred upon the attorney of record in a cause (Board of Commissioners v. Younger, 29 Cal. R. 147), and his power extends to a proceeding of that character.

"The statute (Prac. Act, Sec. 148) provides for both a judgment of nonsuit and a judgment of dismissal, and, by subdivision 2, it is provided that a judgment of dismissal may be rendered at the application of either party upon the written consent of the other. We are of opinion that such a dismissal, when had by such consent, amounts to the open and voluntary renunciation of a suit pending, which must be held to operate a *retraxit*. We have the less hesitation in giving this construction to the statute, because, in practice in this State it has generally, perhaps universally, been considered to be the intention of the parties, in agreeing to dismiss an action, to thereby put an end to the controversy.

"In the Bank of the Commonwealth v. Hopkins, 2 Dana, 395, the first action brought was, by the judgment of the Court, 'dismissed agreed.' To a second action, brought upon the same cause of action, the defendant pleaded that judgment as a defense. In the opinion of the Court sustaining the defense, Mr. Chief Justice Robertson uses this language: 'It has been frequently decided by this Court that the legal deduction from a judgment dismissing a suit 'agreed,' is that the parties had, by their agreement, adjusted the subject-matter of

controversy in that suit; and the legal effect of such a judgment is, therefore, that it will operate as a bar to any other suit between the same parties on the identical cause of action then adjusted by the parties, and merged in the judgment thereon rendered at their instance, and in consequence of their agreement.'

"In the case at bar there was not only a mutual agreement that the action be dismissed by the judgment of the Court, rendered pursuant to the agreement, but the defendant was, by the terms of the agreement of dismissal, adjudged to pay costs, which, except for the agreement and the judgment by which it was carried into effect, he was not bound to pay, but might have otherwise recovered against the plaintiff. These costs he had paid before the commencement of the present action, and to that extent the plaintiff may be said to have obtained a recovery against the defendant in the action. We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even entered by consent, would have that effect, but only that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy by the parties themselves, through the judgment of the Court, as will constitute a defense to another action afterward brought upon the same cause of action."

On a rehearing, the Court said as follows:

"The argument on the rehearing has failed to shake our confidence in the correctness of the views expressed in our former opinion in this cause. Section 148 of the Practice Act, then in force, provides

that 'an action may be dismissed or a judgment of nonsuit entered in the following cases: First, by the plaintiff himself, at any time before trial, upon the payment of costs, if a counter-claim has not been made. Second, by either party upon the written consent of the other. Third, by the Court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. Fourth, by the Court, when upon the trial, and before the final submission of the case, the plaintiff abandons it. Fifth, by the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.' The judgment of dismissal put in evidence in this case does not come within either of these categories. The action was not dismissed by the plaintiff at his own cost, as provided in the first subdivision; nor by either party upon the written consent of the other, as provided in the second subdivision, but by the oral agreement of both parties in open court, the defendant agreeing to pay costs, for which he was not then liable; nor by the Court for the failure of the plaintiff to appear at the trial, or because he failed at the trial to make out a case for the jury, as provided in subdivisions three and five; nor because the plaintiff upon the trial abandoned the case, as provided in subdivision four. These are the only conditions recognized by the statute, on which a judgment of dismissal or nonsuit may be entered, and the plaintiff's case does not come within either of them. But section 149 of the Practice Act provides that: 'In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.' This judgment, therefore, not rendered in accordance with any of the provisions of section 148, but upon the oral agreement of the parties in open court, and with a stipulation that the defendant would pay certain costs, which had not been adjudged against him, must be deemed to be a judgment against the plaintiff on the merits,

> rendered by consent of the parties. These views are merely corroborative of those expressed in our former opinion, which will, therefore, stand as the opinion of the Court."

Of course, the distinction hereinabove given also clearly gives the law as to the nature of a *retraxit*.

In the case of United States v. Parker, 120 U. S. 89, the question arose as to whether a dismissal of the suit upon the agreement of parties was a bar to a subsequent suit upon the same subject-matter, and the Court, holding that it was, discussed the difference between a nonsuit and a *retraxit*, as follows:

> "But a nonsuit is to be distinguished from a *retraxit*. Minor v. Mechanics' Bank, 1 Pet. 46. Blackstone defines the difference as follows: 'A *retraxit* differs from a nonsuit in this: One is negative and the other positive. The nonsuit is a mere default or neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open, voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 Blackstone Com. 296. And it has been held that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves through the judgment of the Court, as will constitute a defense to another action afterwards brought upon the same cause of action. Bank of Commonwealth v. Hopkins, 2 Dana, 395; Merritt v. Campbell, 47 Cal. 542. It is clearly so, when, as here, the judgment recites that the subject-matter of the suit had been adjusted and settled by the parties. This is equivalent to

a judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact. Upon general principles of the common law, regulating the practice and procedure of courts of justice, it must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause.

"If its effect is to be determined by the statutes of Nevada, the same conclusion will be reached. The Civil Practice Act of that State, passed March 8, 1869, Gen. Stat. Nevada, 1885, section 3173, is as follows:

"'An action may be dismissed or a judgment or nonsuit entered in the following cases: First: By the plaintiff himself at any time before trial, upon the payment of costs, if counter-claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon. Second: By either party upon the written consent of the other. Third: By the Court when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. Fourth: By the Court, when upon trial and before the final submission of the case the plaintiff abandons it. Fifth: By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly. In every other case the judgment shall be rendered on the merits.'

"It thus appears that there are five instances in which the dismissal of an action has the force only of a judgment of nonsuit; 'in every other case,' the statute provides, 'the judgment shall be rendered on the merits.' If the case at bar is not included

among the enumerated cases in which a dismissal is equivalent to a nonsuit, it must, therefore, be a judgment on the merits. In the present case the suit was not dismissed by the plaintiff himself before trial, nor by one party upon the written consent of the other, nor by the Court for the plaintiff's failure to appear on the trial, nor by the Court at the trial for an abandonment by the plaintiff of his cause; neither was it a dismissal by the Court upon motion of the defendant, on the ground that the plaintiff had failed to prove a sufficient case for the jury at the trial. The judgment was rendered upon the evidence offered by the defendants, which could only have been after the plaintiff had made out a *prima facie* case. That evidence was passed upon judicially by the Court, who determined its effect to be a bar to the cause of action. This was confirmed by the consent of the attorney representing the United States. The judgment of dismissal was based upon the ground of the finding of the Court, as matter of fact and matter of law, that the subject-matter of the suit had been so adjusted and settled by the parties that there was no cause of action then existing. This was an ascertainment judicially that the defense relied upon was valid and sufficient, and consequently was a judgment upon the merits, finding the issue for the defendants. Being, as already found, for the same cause of action as now sued upon, it operates as a bar to the present suit by way of estoppel."

It is to be noted that in this United States Supreme Court case last cited, the stipulation for dismissal, which was held to amount to a *retraxit*, was entered by agreement of the attorneys, it not appearing that the parties themselves entered into the agreement.

See 30 L. Ed., at page 605, column 1.

So far as the Federal Courts are concerned, therefore,

whether or not the local law on the subject is adopted, the point is settled that a *retraxit* may be entered by the attorney, and does not require the ratification of the client.

In the case of Phillpotts v. Blasdel, 10 Nev. 19, on pages 22 and 23, the Court said:

(By the Court, Belknap, J.):

"An action of ejectment for a mining claim between the parties to the present action was dismissed upon the written stipulation of their attorneys, conditioned that each party paid his own costs, and the plaintiff be released from liability on an undertaking given for a restraining order. Judgment was entered accordingly. Subsequently the present action of trespass for the mesne profits was commenced. In both cases the plaintiff relied upon the same title. The defendant pleaded the judgment in the ejectment suit, and offered it in evidence upon the theory that it was a bar to the plaintiff's recovery. The refusal of the Court to allow this evidence to go to the jury is assigned as error. The intention deduced from the agreement of the defendant to pay costs, for which he was not otherwise liable, and his release of the plaintiff from liability on the injunction bond, is that the parties had adjusted their controversy; and this view is strengthened by the fact that the defendants in pursuance of the settlement quitclaimed the title in litigation to the plaintiff.

"The judgment rendered is not embraced within the provisions enumerated in section 151 of the Practice Act for a judgment of dismissal or nonsuit, and is, therefore, by the terms of the statute, made a judgment upon the merits. For the reasons recited it is against the plaintiff. Its legal effect is to operate as a bar to any other suit between the same parties on the identical cause of action. (Bank of the Commonwealth v. Hopkins, 2 Dana, 395;

> Merritt v. Campbell, 47 Cal. 542.) It is contended, however, in behalf of plaintiff, that such judgment will not work an estoppel to the present action. The claim for mesne profits is founded upon the title and is inseparable from it. To recover, the plaintiff is necessarily required to put in issue and establish his right to the land. In such actions it is settled that a defendant is estopped to deny the record of a judgment in favor of a plaintiff in a prior action of ejectment founded upon the same title; and, as estoppels are mutual, the converse is true, that a like judgment rendered against a plaintiff estops him from asserting his title. Therefore we think the defense was well pleaded."

In the case of Minor v. Mechanics' Bank, 1 Pet. (U. S.), on page 74, the Court said as follows:

> "The nature and effect of a *nolle prosequi* was not well defined or understood in early times; and the older authorities involve contradictory conclusions. In some cases, it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit."

See:

3 Blackstone's Commentaries, 296.

Bank of the Commonwealth v. Hopkins, 2 Dana, (Ky.), 395.

Coffman v. Brown, 7 Smedes & Marshall (Miss.), 125; 45 Am. Dec. 300.

In the case of Pethel v. McCullough, 49 W. Va. 522, 39 S. E. 199, on page 200, the Court, in determining what was a dismissal of a case that would bar a subsequent suit, discussed the matter and cited authorities in the following language:

"What is the effect of an order of 'dismissed agreed?' It is a bar to another suit upon the same cause, on the principle of a compromise decree on the merits in equity, or a *retraxit* at common law, either of which is a bar to another suit. Hoover v. Mitchell, 25 Grat. 387, holds it *prima facie* final, at least; but Wohlford v. Compton, 79 Va. 333, holds it final as to all matters which were actually, or might have been, litigated in the suit. In Siron v. Ruleman's Ex'r., 32 Grat. 223, it is so declared. In Jarboe v. Smith, 10 B. Mon. 257, 52 Am. Dec. 541, it is held a bar 'between all parties on the original cause of action, unless there is an express stipulation that another suit may be brought.' Such is the great weight of authority. 1 Freem. Judgm., Sec. 262; 1 Herm. Estop. 296; 1 Van Fleet, Former Adj., Sec. 33. One decision of the United States Supreme Court denies this position. Haldeman v. U. S., 91 U. S. 584, 23 L. Ed. 433. But U. S. v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601, holds the doctrine stated. So, 2 Black., Judgm., Sec. 706, says that it is settled law. The point is not decided in Stockton v. Copeland, 30 W. Va. 674, 5 S. E. 143. The words, 'dismissed agreed,' are very strong. Though the order is abbreviated, so far as it goes it imports compromise and adjustment, and a decree ending the case on that ground. A compromise decree is final. Lockwood v. Holliday, 16 W. Va. 651; U. S. v. Parker, supra. A dismissal agreed is equivalent to a *retraxit* at common law, which is an 'open, voluntary renunciation of his claim in court, and by this he forever loses his action.' 3 Bl. Comm. 296. In the words of the Court in Hoover v. Mitchell, cited, this short expression is 'a declaration of record, sanctioned by the judgment of the Court, that the cause of action has been adjusted by the parties themselves in their own way, and that the suit is dismissed agreed.' But in this case the order is longer, clearer, and expressly certifies an adjustment by the parties."

There can be no doubt, therefore, that the dismissal of the former action on agreement amounted in terms to a *retraxit*, and that such *retraxit* is an absolute bar to the prosecution of the present action.

The defendant pleaded in its answer the proceedings in the former case (No. 261), and then proceeded to state the legal conclusions to be drawn therefrom. The plaintiff, in its reply, admits all of the allegations of fact set up in the plea of *retraxit*, but simply denies the immaterial allegations as to the legal conclusions. Plaintiff simply pleads that an attorney has no authority to enter a *retraxit*. The point as to the authority of the attorney being sufficiently disposed of, we suggest to the Court that all that remains is that the plaintiff has admitted facts from which we believe the Court can draw only one conclusion, and that is that a *retraxit* took place.

Upon examining the proceedings in the former action (No. 261), which the defendant offered to prove (Record, pages 282 to 295), the Court will observe that the former action was against several defendants. The plaintiff, apparently becoming convinced that his right to recover was against the defendants other than the present plaintiff in error in this case, by oral agreement, in open court, and entered upon the minutes of the court, had the case dismissed as to the defendant Colusa Parrot Mining and Smelting Company.

The words "without prejudice," inserted in the order of dismissal, surely mean nothing more than that the dismissal as to the Colusa Parrot Mining and Smelting Company was to take place without impairing the plaintiff's

right to continue the action as against the other defendants. That this is the construction placed upon the order by the plaintiff's counsel is shown by their conduct throughout the proceedings. In their reply to the answer, as above pointed out, they make only one point, and that is the lack of authority in the plaintiff's attorney to enter the *retraxit*. In their objections to the offer of proof by defendant of the proceedings in the former action (Record, page 284), the same point seems clear; and plaintiff nowhere in the argument or proceedings relied for a moment upon the words "without prejudice," inserted in the order. Plaintiff himself has, therefore, placed upon the order the construction for which we contend, namely, that so far as the Colusa Parrot Mining and Smelting Company is concerned, the order was an absolute order of dismissal by agreement of the parties, each party to pay his own costs.

For the foregoing errors, herein discussed, the judgment of the Circuit Court was wrong, and it should be reversed.

Respectfully submitted,

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